Supreme Court, U.S.
FILED

07-326 JUL 12 2007

OFFICE OF THE CLERK

No. (1)

IN THE SUPREME COURT OF THE UNITED STATES

Paul L. Minnich, Petitioner

v.

Paul W. Minnich,
Val Suenderhaft, and
Rachelle Weaver, Respondents

Petition of Paul L. Minnich for a Writ of Certiorari to the Superior Court of the Commonwealth of Pennsylvania from the Memorandum and Order entered by that Court in "IN RE ESTATE OF PAUL W. MINNICH, Deceased" Docketed in that Court at No. 241 MDA 2006, which Memorandum and Order were affirmed by the Supreme Court of the Commonwealth of Pennsylvania by its Order dated April 13, 2007, which Order denied Petitioner's Petition for Allowance of Appeal to that Court.

PETITION FOR A WRIT OF CERTIORARI

Paul L. Minnich, *pro se*
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a. Question Presented for Review.

Does a Trial Court commit fundamental error, in violation of the Due Process clause of the United States Constitution, when it grants summary judgment without giving the party against whom the judgment is entered a full and fair opportunity to supplement the record and to oppose the motion?

Petitioner respectfully urges an affirmative answer.

b. List of all parties.

The parties are identified on the Cover of this Petition. To repeat, the Petitioner here is Paul L. Minnich and he is proceeding *pro se*. The Respondents are Paul W. Minnich and Val Suenderhaft, the children of Petitioner, and Rachelle Weaver is also a Respondent. The Respondents have been represented by James E. Chiaruttini, Esquire, Barley, Snyder, Senft & Cohen, LLC,100 East Market Street, York, Pennsylvania 17405-7012, and this Petition has been served on Mr. Chiaruttini.

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To the best of Petitioner's knowledge, none of the Opinions or Orders entered in this case have been published, either officially or unofficially.

e. Statement of the basis for jurisdiction of the Supreme Court

(i). This Petition seeks review of a final Order entered by the Supreme Court of Pennsylvania, which is the Court of last resort of that Commonwealth, and that Order was entered on April 13, 2007. See App. 31. The Order entered by the Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal to that Court, so the Petition here seeks a Writ of Certiorari directed to the Superior Court of Pennsylvania, an intermediate appellate Court, which was the last Pennsylvania State Court to address the merits of Petitioner's appeal.

(ii). No orders respecting rehearing or an extension were requested or entered.

(iii). Rule 12.5 is not applicable to this Petition for Certiorari.

(iv). This Court has jurisdiction to consider this Petition pursuant to the authority of 28U.S.C. §1257.

f. Constitutional provisions.

The Fifth Amendment to the United States Constitution states, in relevant part, as follows:

"No person shall... be deprived of life, liberty, or property, without due process of law..."

The Fourteenth Amendment to the United States Constitution states, in relevant part, as follows:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

g. Statement of the case.

The question presented in this Petition relates to whether this Petitioner was denied his right to due process when the Trial Court entered a *sua sponte* order of summary judgment against Petitioner without providing any notice to Petitioner that it was about to enter such an order and without providing Petitioner an opportunity to be heard in opposition to that order. The proceedings in the Trial Court are not complex and can be fairly stated as follows.

On October 9, 2001, Paul L. Minnich, the Petitioner herein, filed a Petition Sur Appeal with the Orphans' Court Division of the Court of Common Pleas of Lancaster County, Pennsylvania, contesting the admission to probate of the Will and a Codicil of Paul W. Minnich, Sr., a Decedent and the Petitioner's father.

On November 15, 2001, the Petitioner filed with the Orphans' Court Division a Petition for Leave to Conduct Discovery, since such leave was then required by both the Local Rules and Pennsylvania Rules. See Lancaster County Orphans' Court Rule 3.6 and Pennsylvania Orphans' Court Rule 3.6.

On June 6, 2002, the Respondents to this Petition and the Proponents of the Will in the Court of Common Pleas, herein Respondents, filed with the Trial Court motions for summary judgment along with supporting briefs and affidavits. On July 5, 2002, Petitioner filed a verified response to the motions for summary judgment and Petitioner also filed a brief in support of his argument that the motions for summary judgment should be denied. On or about July 15, 2002, the Appellees filed a brief in reply to the arguments advanced by the Petitioner, and the parties presented oral argument regarding the motions to the Honorable Jay J. Hoberg on January 16, 2003.

On December 31, 2003, Judge Hoberg entered an Order (herein the 2003 Order) that granted the Appellant's Petition for Leave to Conduct Discovery, which had been filed on November 15, 2001. See App. 12. That 2003 Order specifically stated, "the Court is compelled to agree with counsel that [Pennsylvania Rule of Civil Procedure] 1035.2 prohibits the entry of summary judgment until the completion of discovery." The Order also said, "the Court concludes that it must grant the petition for discovery and defer a decision on the motions for summary judgment until the completion of discovery."

In response to the 2003 Order, Petitioner served on the Respondents extensive discovery requests, including Notices of Depositions, Interrogatories, Requests for Production of Documents, and Notices of Intent to Serve Subpoenas. In further response to and pursuant to the authority of the 2003 Order, the Petitioner noticed and took the depositions of the Executors and beneficiaries of the contested will. The Petitioner also took the deposition of two medical providers of the Decedent.

In addition to the depositions referenced above, the Petitioner also filed formal Requests for Production of Documents on the Respondents and he received documents numbering more than 500 pages from the Executors' counsel. The 2003 Order did not establish any requirements beyond completion of discovery by a certain date and the Petitioner fully completed the discovery authorized by the 2003 Order within the strict time constraints of the Order. The Respondents did not engage in any discovery. Pursuant to the mandates of Rule 4002.1 of the Pennsylvania Rules of Civil Procedure, none of the Petitioner's discovery was filed with the Court. No further judicial actions or proceeding were undertaken by any parties.

On January 9, 2006, Judge Hoberg, *sua sponte*, entered two Orders in which he granted the motions for summary judgment that had been filed on June 6, 2002, by the

Respondents. See App. 15 - 17(herein the 2006 Order). The Court did not give the parties any notice prior to the entry of the 2006 Order, so the parties did not have any opportunity to be heard prior lo the entry of the Orders.

On January 26, 2006, Petitioner filed with Judge Hoberg a Motion for Reconsideration of the 2006 Order, and that Motion raised the issue that the Order had been entered without giving Petitioner notice and an opportunity to be heard. On February 6, 2006, Petitioner filed a Notice of Appeal to the Pennsylvania Superior Court, an intermediate appellate Court. On February 26, 2006, the Trial Court, per Judge Hoberg entered an Order denying Petitioner's Motion for Reconsideration. On April 24, 2006, the Trial Court, per Judge Hoberg, entered an Opinion Sur Appeal that affirmed its prior Orders that granted the Respondents' Motions for Summary Judgment. See App. 19.

On October 24, 2006, the Superior Court entered an Order affirming the Order of Judge Hoberg. See App. 27. On April 13, 2007 , the Pennsylvania Supreme Court entered an Order denying Petitioner's Petition for Allowance of Appeal. See App, 31.

h. Argument.

(i). Petitioner's right to challenge his father's will was a property right protected by due process.

In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the Court held that "a cause of action against [an] estate for an unpaid bill ... is property protected by the Fourteenth Amendment." 485 U.S. at 487. The *Pope* Opinion cited *Logan v. Zimmerman Brush Co.*, 455 U.S. 222 (1982), as authority, and the *Logan* Opinion said, "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." 455 U.S. at 428. Both Opinions held that an individual can be deprived of such a protected property interest only after being afforded

"constitutionally adequate notice and hearing procedures." *Logan*, 455 U.S. at 429; *Pope*, 485 U.S. at 484. And both Opinions recognized that the right to adequate notice would be worthless if the party did not receive an opportunity to be heard prior the deprivation. Id.

In *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996), the Court said, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings." 517 U.S. at 798. The Court held that the right to be heard necessarily involves the right to defend. 517 U.S. at 799, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Supreme Court in *Memphis Light, Gas, and Water Division v. Craft*, 436 U.S. 1 (1978), said, "[A] hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." 436 U.S. at 16.

The Trial Court in this case did not afford this Petitioner his right to notice and an opportunity to be heard before it entered its Order granting the motion for summary judgment filed by the Respondents. Instead, on December 31, 2003, the Trial Court entered an Order that granted Petitioner's petition to conduct discovery and deferred its resolution of the motion for summary judgment. The next judicial action occurred on January 9,2006, over two years later, when the Court entered a *sua sponte* Order granting the motions for summary judgment that had been filed and briefed in June and July/ 2002, three and a half years earlier. And it is undisputed that the entry of the 2006 *sua sponte* Order was not preceded by any notice to the parties and an opportunity to be heard that the Court was about to revisit the issue that had been deferred two years earlier. This Court and the Federal Courts of Appeals held that such a *sua sponte* Order is improper.

(ii) A Court must afford a party notice and an opportunity to be heard before entering a *sua sponte* Order granting a motion for summary judgmcnt.

In its Opinion in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), this Court said, "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." 477 U.S. at 326. That *notice* v as never given in this case. Instead, the Court here granted Petitioner's request for discovery and then, almost two years later, the Court entered a *sua sponte* Order granting the Respondents' motion for summary judgment The Court never put Petitioner "on notice that [he] had to come forward with all of [his] evidence."

The Courts of Appeal have consistently enforced the rule. For example, in *Miller v. Houghton*, 115 F,3d 348 (5th Cir. 1997), the Court said, "when a court is considering vacating and reversing a prior denial of summary judgment on the basis of newly presented evidence, the court must give the adverse party notice and an opportunity to respond to such evidence." That principle should be applicable here, since the Court in this case was considering a motion on which it had deferred its ruling two years earlier. The Sixth Circuit has characterized the requirement as "unequivocal notice," and the Court has said that the failure to comply with that degree of notice "deprives the court of authority to grant summary judgment...." *Helwig v. Vencor, Inc.*, 251 F.3d 540, 543 (6th Cir. 2001). See cases collected at Wright, Miller & Kane, §2720, at Volume 10A, pages 339-355 and Supplement at pages 35-37.

Of course, those Opinions all interpreted Federal Rule 56, but this Petition submits that the requirements of notice and an opportunity to be heard are essential elements of the due process guaranteed by the Constitution, and this Petitioner submits that this Court should so decide.

In sum, this Court has said, "The fundamental requisite of due process of law is the opportunity to be heard, The hearing must be 'at a meaningful time and in a meaningful manner,'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (Citations omitted). The Petitioner here was most certainly not provided with any hearing "at a meaningful time and in a meaningful manner," and Petitioner respectfully submits that this Court should review and correct the actions of the Trial Court that denied Petitioner's due process rights.

(iii) The Trial Court in this case did not afford the Petitioner with a hearing at a meaningful time and in a meaningful manner.

The Petitioner had filed his Petition for Leave to Conduct Discovery on November 15, 2001, and the Respondents filed their Response to that Petition on or about November 28, 2001. The Respondents filed their Motion for Summary Judgment on June 6, 2002, and Petitioner filed his Response to that Motion on July 5, 2002. Hence, on January 16, 2003, when the parties presented oral argument to Judge Hoberg, there were two matters pending before the Court, Petitioner's Petition for Discovery and Respondents' Motion for Summary Judgment. By his Order entered on December 31, 2003, Judge Hoberg specifically granted Petitioner's Petition for Discovery and he "deferred" Respondents' Motion for Summary Judgment "until the completion of discovery." See App.

After the entry of that Order, Petitioner undertook substantial discovery and neither the Petitioner nor the Respondents filed any of that discovery with the Court or renewed the Motions for Summary Judgment in any manner. Pursuant to Rule 1035.2(a) of the Lancaster County Rules of Court, either party could have listed the Motion for disposition by the Court but neither did so. Notwithstanding the parties' mutual inaction, on January 6, 2006, the Court entered an Order, *sua sponte*, which granted

the Respondents' Motion. The Respondents cannot seriously argue that Petitioner received any notice before the Court entered its *sua sponte* Order, as mandated by this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986) and *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

By entering the *sua sponte* judgment, the Trial Court deprived this Petitioner's constitutional right to due process.

(i) Appendix.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

In Re: ESTATE OF :

PAUL W. MINNICH, : No. 36 - 2001 - 0234

Deceased :

MEMORANDUM AND ORDER

By HOBERG, J.

Before the Court for disposition are a motion for summary judgment filed by respondents, Paul W. Minnich and Val Suenderhaft, and a motion for summary judgment filed by respondent, Rachelle Weaver. Briefs were filed with the Court and oral argument was held. At oral argument, Gary L. Kelley, Esq. Appeared specially for Paul L. Minnich, the contestant in the appeal from probate. In his opposition to the motions, counsel brought to the attention of the Court the fact that a petition for discovery which had been filed by prior counsel with the predecessor of the undersigned was still pending. Upon review, the Court is compelled to agree with counsel that R.C.P 1035.2 prohibits the entry of summary judgment until the completion of discovery. The petition for discovery must therefore be considered at this time. A contestant in a will contest alleging lack of testamentary capacity and undue influence is entitled to inspect and copy medical records by treating physicians: *Kohr Est.*, 26 Fiduc. Rep.419.

> "While 'fishing expeditions' are not to be countenanced under guise of discovery, requests for discovery must be considered with liberality as the rule rather than the exception"; *Thompson Will*, 416 Pa. 249, 261 (1965).

Under the present circumstances the contestant is entitled to his full "day in court".

Although to a certain extent the contestant's allegations appear to be lacking in substance, the Court concludes that it must grant the petition for discovery and defer a decision on the motions for summary judgment until the completion of discovery. Accordingly, the following order is entered.

ORDER

NOW, this 31st day of December 2003, Paul L. Minnich is hereby granted leave to take the depositions of the persons named in his petition and to inspect and copy medical records of health care providers for Paul W. Minnich. All discovery shall be completed within sixty (60) days of the date of this Order.

BY THE COURT:

/s/ Jay J.Hoberg

JAY J. HOBERG, JUDGE

ATTEST: /s/ Cindy L. Lowe

DEPUTY CLERK OCD

Copies to:

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Paul L. Minnich

460 Edgehill Road
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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

In Re: ESTATE OF :

PAUL W. MINNICH, : No. 36 - 2001 - 0234

Deceased :

ORDER

AND NOW, this 9th day of January 2006, upon consideration of the Motion For Summary Judgment of Paul W. Minnich and Val Senderhaft, the Response and New Matter of Paul L. Minnich, the Response of Paul W. Minnich and Val Suenderhaft to new Matter, the Brief and Reply Brief of Paul W. Minnich and Val Suenderhaft, the Brief of Paul L. Minnich, the oral arguments of the parties, and with the time for the completion of discovery per the court order of December 31, 2003 having expired without any additional evidence being filed to the record, the court orders that the Motion For Summary Judgment of Paul W. Minnich and Val Suenderhaft is hereby granted and the Petition Sur Appeal filed by Paul L. Minnich is dismissed with prejudice.

BY THE COURT:

/s/ Jay J. Hoberg

JAY J. HOBERG, JUDGE

ATTEST: /s/ Cindy L. Lowe

DEPUTY CLERK OCD

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James E. Chiaruttini, Esq.
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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

In Re: ESTATE OF :

PAUL W. MINNICH, : No. 36 - 2001 - 0234

Deceased :

ORDER

AND NOW, this 9th day of January, 2006, upon consideration of the Motion For Summary Judgment of Rachelle Weaver, the Response and New Matter of Paul L. Minnich, the Response of Rachelle Weaver, the Response and New Matter of Paul L. Minnich,, the Response of Rachelle Weaver to New Matter, the Brief and Reply Brief of Rachelle Weaver, the Brief of Paul L. Minnich, the oral arguments of the parties, and with the time for the completion of discovery per the court order of December 21, 2003 having expired without any additional evidence being filed to the record, the court orders that the Motion for Summary Judgment of Rachelle Weaver is hereby granted and the Petition Sur Appeal filed by Paul L. Minnich is dismissed with prejudice.

BY THE COURT:

/s/ Jay J. Hoberg

JAY J.HOBERG, JUDGE

ATTEST: /s/ Cindy L. Lowe

DEPUTY CLERK OCD

Copies to:

James E. Chiaruttini, Esq.

Paul L. Minnich, *pro se*
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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

In Re: ESTATE OF :

PAUL W. MINNICH, : No. 36 - 2001 - 0234

Deceased :

OPINION SUR APPEAL

PROCEDURAL HISTORY

Paul W. Minnich died January 1, 2001. His will dated October 20,1997 and codicil dated May 31, 2000 were admitted to probate by the Register of Wills of Lancaster County by decree dated February 8, 2001.

On October 9, 2001, a Petition Sur Appeal from Probate was filed by decedent's son, Paul L. Minnich, seeking to revoke the probate of the will and codicil. At the same time, Paul L. Minnich (hereinafter, "contestant") filed a Petition for Temporary Injunction seeking to stop an auction of peronalty scheduled by the executors.

On October 12, 2001, the petition for injunctive relief was dismissed by Judge Paul K. Allision.

On October 22, 2001, contestant's attorney, 0. Howard Mummau petitioned for leave to withdraw as counsel. Leave to withdraw was granted and contestant proceeded *pro se* until an appearance was entered by Keefer Wood Allen & Rahal, LLP on November 19, 2001.

On November 19, 2001, a Petition for Leave to Conduct Discovery was filed by contestant.

On February 6, 2002, a praecipe to withdraw as counsel was filed by Keefer Wood Allen & Rahal, LLP.

On June 6, 2002, Motions for Summary Judgment and a brief for in support thereof were filed by Rachelle Weaver.

On July 5, 2002, contestant filed a response to the Motions for Summary Judgment and supporting briefs.

On July 15, 2002, reply briefs in support of the Motions for Summary Judgment were filed.

On December 30, 2002, the court entered an order scheduling oral argument on Motion for Summary Judgment on January 16, 2003 at 1:30 p.m. At that time Gary L. Kelley, Esquire, appearing specially for contestant, argued that the Motions for Summary Judgment should not be granted because discovery had not been competed as required by Pennsylvania Rule of Civil Procedure 1035.2. He pointed out that contestant's prior petition for leave to conduct discovery had not been disposed of by the court. The court agreed with contestant's position, however, rather than denying the motions, the court deferred disposition thereof and entered an order on December 31, 2003 granting leave for discovery to be competed within 60 days.

On January 9, 2006, the court granted the Motion for Summary Judgment filed by Paul W. Minnich and Val Suenderhaft. The Motion for Summary Judgment filed by Rachelle Weaver was also granted by order entered January 9, 2006. A Motion for Reconsideration, filed by Paul L. Minnich on January 26, 2006, was denied by the court on February 14, 2006. Paul L. Minnich filed Notice of Appeal on February 6, 2006. In accordance with Rule 1925(b), the court directed appellant to file a Concise Statement of Matters Complained of on Appeal on or before February 24, 2006. The appellant complied with the said order on February 24, 2006. His Statement of Matters Complained of on Appeal contains four paragraphs which are general in nature and cite only "Pennsylvania law" and the "United States Constitution". The common thread is the appellant's belief that he had been denied the right to be heard.

In order to address the appellant's concern I will set forth the reasons for me granting of the Motions for Summary Judgment.

The decedent, Paul W. Minnich, was eighty-eight, at the time of his death. His spouse, Vera L. Minnich died four years earlier. The decedent was survived by his son, Paul L. Minnich, contestant, and two grandchildren, Paul W. Minnich and Val Suenderhaft. The decedent's will was prepared by Harry B. Yost, Esquire and codicil dated May 21, 2000 was prepared by Dennis B. Hartranft, Esquire. In his will, the decedent bequeathed his entire estate to his grandchildren, Paul W. Minnich and Val Suenderhaft, The codicil added a legacy to Rachelle L. Weaver in the amount of $60,000.00.

The decedent's relationship with his son deteriorated after the death of Vera L. Minnich. They got into an argument at the funeral home and the decedent and his son did not speak to each other during the last three and one-half years of the decedent's life.

In 1997, while decedent was recovering from a broken foot, contestant, without warning, reported him to Township authorities for violating a township ordinance relating to the disrepair of a farm building. Decedent stated that the building had suffered roof damage from a heavy snowfall and that he was not aware of the ordinance. The extent of contestant's animosity toward his father is demonstrated by an incident which happened while decedent was in the hospital in the Summer of 1997. Contestant wrote in a note to his wife, "as to my father, tell him I hope God continues to punish him with pain and suffering".

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides:

After the relevant pleadings are closed, but within such times as to not unreasonably delay trial, any party may

move for summary judgment in whole or in part as a matter of law

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury.

The party moving for summary judgment has the burden of proving that no genuine issue of material fact exists. Lyman v. Boonin, 535 Pa. 397, 635 A.2d 1029 (1993). In ruling on a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against fhe moving party. Pennsylvania State University v. County Centre, 532 Pa. 142, 615 A2d 303 (1992). Further, the court must give the non-moving party the benefit of all reasonable inferences. Elder v. Nationwide Ins. Co., 410 Pa. Super. 290, 599 A.2d 996 (1991).

The basis of contestant's appeal from probate is the allegation that respondents exerted undue influences over the testator. He did not allege lack of testamentary capacity. Once a will is admitted to probate, a contestant asserting undue influence has the burden of proof. Estate of Glover, 447 Pa. Super. 509, 516, 669 A.2d 1011,1015 (1996). The contestant must prove by clear and convincing evidence that a confidential relationship existed, that the person enjoying such relationship received the bulk of the estate, and that the decedents intellect was weakened. Id. If the contestant establishes all three elements, then the burden shifts to

the proponent of the will to show the absence of undue influence. Id.

The essential element of shifting the burden is proof of weakened intellect. Weakened intellect has been described as follows:

> "The closest that we can come, therefore, to a definition of weakened intellect is that it is a mind which, in all the circumstances of a particular situation, is inferior to normal minds, in reasoning power, factual knowledge, freedom of thought and decision, and other characteristics of a fully competent mentality. It should be viewed essentially as a relative state as the term is applied to cases of undue influences, as these always involve the effect of one intellect upon another; if the intellect of the testator is substantially impaired in comparison to that of the proponent or beneficiary it must be regarded as weakened since there could be no equal dealings between the two parties." Heffner Will, 19 Fiduc. Rep. 546-547; Paolini Will, 13 Fiduc. Rep.2d 185, 197-188. (1993)

Physical infirmities alone are not enough to establish a weakened intellect. Estate Of Glover, Id.

The Extent of the evidence presented by the proponents of the will on the issue of testator's mental and physical condition is extraordinary. The appendix of Exhibits filed with proponent's brief includes 16 affidavits. Among them are affidavits of four attorneys, including the scrivener of the will and the scrivener of the codicil. The list also includes the affidavits of five physicians, a nurse and decedent's pastor. Harry B. Yost, Esquire, an attorney with many years of experience, drafted the decedent's will. In his affidavit he stated that he believed unequivocally that the testator had full testamentary capacity, did not suffer from diminished or weakened intellect and had a strong

personality not easily influenced by others.

In his affidavit, Dennis M. Hartranft, Jr., Esquire, scrivener of the codicil, stated that he found the decedent to be clear-minded, sharp, fully capable and aware of his estate, his relationships and his wishes as to distribution of his estate.

David T. Superdock, M.D. stated that the decedent was his patient between June, 1997 and September,1999, and in the course of ten office visits he found he decedent to be clear-minded, sharp and never noticed any signs of mental weakness or disability.

Richard E. Berg, D.O., was decedent's physician between September 1999 and the time of decedent's death. He stated that as part of a compete physical examination he gave the decedent a neurological examination on September 14, 2000. He found that the decedent was in good health mentally and physically with all reflexes functioning normally, cranial nerves grossly intact and that he was well-oriented as to person, place and time.

In various additional affidavits persons well-acquainted with the decedent states that he was possessed of a strong personality and would not be easily influenced by others.

The contestant, on the other hand, has failed to produce any documents, affidavits or other evidence to contradict the evidence submitted by proponents. In his response to the Motion for Summary Judgment he points to the affidavit of Richard E. Berg, D.O. filed by proponents. In the affidavit the doctor explains that the decedent, who had struck his head the prior day, appeared in his office and seemed dazed, lightheaded and had difficulty answering questions. The contestant argues that this is evidence of weakened intellect. The proponents thereafter filed a Supplemental Affidavit of Dr. Berg in which he states that

he decedent visited his office on four occasions subsequent to September 22, 2000 and displayed no lingering effects or problems resulting from the head injury.

The contestant also argues that the Motion for Summary Judgment should not be granted because of proponent's reliance on testimonial affidavits. The proponents, however, point to their forty-five exhibits only sixteen of which are affidavits. The remaining exhibits, they suggest, include documentary evidence and admissions contained in excerpts of depositions.

Weakened intellect is a necessary element of this cause of action. Contestant has failed to produce any evidence of weakened intellect.

The Supreme Court in Ertel v. Patriot-News Co., 674 A2d 1038 (Pa. 1996), citing Celotcx Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 1986 stated:

> "We find the reasoning of the United States Supreme Court to be persuasive, and therefore adopt it. Thus, we hold that a non-moving party must adduce sufficient evidence on an issue essential to his case an on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and thai the moving party is entitled to judgment as a matter of law."

In order for the contestant to prevail he would have to succeed in undermining the testimony of proponent's sixteen affiants and produce favorable evidence from sources the identity and existence of which are nowhere and suggested on the record.

> "We have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case (or, in some matters, issues in a case) where a

party lacks the beginnings of evidence to establish or contest a material issue.... Forcing parties to go to trial on a merit-less claim under the guise of effectuating me summary judgment rule is a perversion of that rule," Ertel v. Patriot-news Co.

For the foregoing reasons,1 conclude that the Motions for Summary Judgment were appropriately granted.

BY THE COURT:

/s/JAY J.HOBERG

Dated: 4/24/06 JAY J. HOBERG, JUDGE

ATTESTED: /s/ Cindy L. Lowe

DEPUTY CLERK OCD

Copies to:

James E. Chiaruttini, Esq.
Paul L. Minnich,

NON-PRECEDENTIAL DECISION -
SEE SUPERIOR COURT I.O.P. 65.37

IN RE: THE ESTATE OF PAUL W. MINNICH, Deceased	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: PAUL W. MINNICH, Appellant	:	No. 241 MDA 2006

Appeal from the Orders Entered January 9, 2006
In the Court of Common Pleas, Orphans' Court Division
Lancaster County, No. 36-2001-0234

BEFORE FORD ELLIOTT, P.J, TODD, and BOWES, JJ.
MEMORANDUM: FILED: October 24, 2006

Paul L. Minnich appeals the January 9, 2006 orders of Lancaster County Court of Common Pleas, Orphans' Court Division, granting summary judgment in favor of Appellees.[1] We affirm.

The facts and procedural history of this case may be summarized as follows. On October 20,1997, Paul W. Minnich, Sr. ("Decedent") executed a will which left his estate, the primary asset of which was a one-half interest in a 115-acre farm, to his two grandchildren, Appellees Paul W. Minnich and Val Suenderhaft. On May 31, 2000, he executed a codicil making a specific bequest of $60,000 to his friend. Appellee Rachelle L. Weaver. Decedent died on January 1, 2001 at the age of 88, and was survived by his son, Appellant Paul L. Minnich, and his two grandchildren. Decedent's wife, Vera L. Minnich, had died approximately 4 years earlier.

As the trial court noted in its opinion filed pursuant

to Rule 1925 (a) of the Pennsylvania Rules of Appellate Procedure, Decedent's relationship with his son, Appellant, deteriorated soon after the death of Decedent's wife January 1997:

> They got into an argument at the funeral home and [Decedent] and [Appellant] did not speak to each other during the last three and one-half years of [D]ecedent's life.
>
> In 1997, while [D]ecedent was recovering from a broken foot, [Appellant], without warning, reported him to Township authorities for violating a township ordinance relating to the disrepair of a farm building. Decedent stated that the building had suffered roof damage from a heavy snowfall and that he was not aware of the ordinance. The extent of [Appellant's] animosity toward his father is demonstrated by an incident which happened while [D]ecedent was in the hospital in the Summer of 1997. [Appellant] wrote in a note to his wife, "as to my father, tell him I hope God continues to punish him with pain and suffering."

(Trial Court Opinion, 4/24/06, at 3-4.)

On October 9, 2001, Appellant filed a petition sur appeal from probate, seeking to overturn his father's will and codicil on the basis of undue influence. On the same day, Appellant also filed a petition to temporarily enjoin an auction of the estate's personal property, which the trial court summarily dismissed. Shortly thereafter, Appellant's attorney, 0. Howard Mummau, petitioned for leave to withdraw as Appellant's counsel. The petition was granted, and Appellant proceeded *pro se* for about a month until Keefer Wood Allen & Rahal, LLP ("Keefer Wood") entered an appearance on his behalf and filed a petition for leave to conduct discovery on November 19, 2001. Keefer Wood subsequently withdrew as Appellant's counsel in February

2002, however, and Appellant again proceeded *pro se*.

In June 2002, Appellees filed motions for summary judgment, together with supporting briefs, numerous affidavits, excerpts of deposition testimony, and other supporting documentation. Appellant filed a response to the summary judgment motions, but submitted no affidavits or other record evidence to support his will contest claim. The trial court heard oral arguments on the motions 1 January 2003, at which time Gary L. Kelley, Esquire, appearing for Appellant, argued that the motions should not be granted because discovery had not yet been completed. On December 31, 2003, the trial court issued an order indicating that, although Appellant's allegations appeared to be lacking in substance, he should be given an opportunity to conduct discovery. The court noted in the order that it would defer ruling on the summary judgment motions until after discovery was completed, and gave sides 60 days to complete discovery.[ii]

Two years later, on January 9, 2006, the trial court granted Appellees' summary judgment motions. Appellant filed a motion for reconsideration, which was denied, and this appeal followed wherein Appellant presents the following issues for our review:

A. Does a Trial Court commit fundamental error when it reverses a ruling it previously made in another phase of the litigation of the same case before the same court if there has been no change in the law or the facts and there has been no showing that the previous ruling was clearly erroneous?

B. Does a Trial Court commit fundamental error when it grants summary judgment without giving the party against whom the judgment is entered a full and fair opportunity to supplement the record and to oppose the motion?

C. Does a Trial court commit fundamental error when it grants summary judgment pursuant to a motion that relies exclusively on oral testimony, through testimonial affidavits and deposition testimony?

D. Does a Trial Court commit fundamental error when it grants summary judgment despite the existence of genuine issues of material fact in the record before the Court?

E. Did the Trial Court err when it failed to find thai a prima facie case of undue influence was established where (1) a person in a confidential relationship (2) receives the bulk of testator's property [i.e., substantial benefit] (3) from a testator of weakened intellect?

(Appellant's Brief at 1-2.)

We initially note that appellant did not include his first, third, fourth, or fifth issue in his statement of matters complained of on appeal ordered pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. We thus find those issues to be waived. *See* ***Commonwealth v. Castillo,*** 888 A.2d 775 (Pa. 2005) (reaffirming bright-line waiver rule established in ***Commonwealth v. Lord,*** 553 Pa. 415, 719 A.2d 306 (1998), that issue not raised in a court-ordered 1925 (b) statement are waived).

With respect to Appellant's remaining argument that the trial court did not give him a full and fair opportunity to oppose Appellees' summary judgment motions and supplement the record, we find no merit to this argument. As a review of the record clearly demonstrates. Appellant was given ample opportunity to oppose the motions and supplement the record. He was given 30 days to respond to Appellees' summary judgment motions which were

filed in June 2002, and had over three years to supplement his response before summary judgment was granted in January 2006. Moreover, as noted above, in December 2003, the trial court gave Appellant an additional 60 days to conduct discovery. Under these circumstances, we find Appellant was given a full and fair opportunity to oppose the summary judgment motions and supplement the record with evidence to contest the motions. We thus reject his argument on this point, and affirm the trial court's orders granting summary judgment in favor of Appellees.

Orders **AFFIRMED.**

October 24, 2006

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: THE ESTATE OF PAUL W. MINNICH, Deceased	:	No. 1002 MAL 2006
	:	Petition for Allowance of Appeal from the Order of the Superior Court
PETITION OF: PAUL L. MINNICH,	:	

ORDER

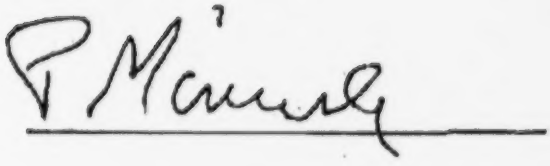
PER CURIAM

AND NOW, this 13th day of April, 2007, the Petition for Allowance of Appeal is hereby **DENIED.**

Mr. Justice Fitzgerald II did not participate in the consideration or decision of this matter.

For the foregoing reasons, Petitioner Paul L. Minnich respectfully submits that the Court should issue a Writ of Certiorari as requested herein.

Respectfully submitted,



Dated:

7/12/07

Paul L. Minnich, *pro se*
P.O. Box 1094
York, Pennsylvania 17403
(717) 424-8190

I hereby certify that the foregoing Petition was served by placing true and exact copies thereof in the United States mail, postage prepaid, addressed as follows:

James E. Chiaruttini, Esquire
Barley, Snyder, Senft & Cohen,
LLC 100 East Market Street
York, Pennsylvania 17405-7012

Dated:
2/12/07

Paul L. Minnich, *pro se*

I hereby certify that the foregoing Petition was served by placing true and exact copies thereof in the United States mail, postage prepaid, addressed as follows:

James E. Chiaruttini, Esquire
Stock and Leader Law Offices
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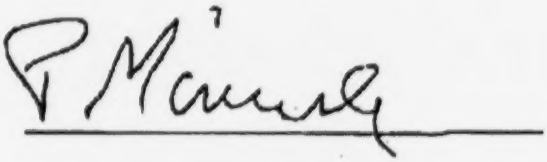
York, Pennsylvania 17404.



Dated:

September 10, 2007

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